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UNITED STATES FIDELITY & GUARANTY
COMPANY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

HOME DEPOT U.S.A., INC.,

Plaintiff,

vs.

UNITED STATES FIDELITY and
GUARANTY COMPANY, TRAVELERS
INSURANCE COMPANY, and DOES 1
through 10, inclusive,

Defendants.

No. RG07359448

DEFENDANT UNITED STATES
FIDELITY & GUARANTY COMPANY'S
ANSWER TO PLAINTIFF HOME
DEPOT U.S.A., INC.'S COMPLAINT

Complaint filed: December 4, 2007

BY FAX

1 COMES NOW defendant United States Fidelity & Guaranty Company ("USF&G") and
2 responds to plaintiff Home Depot U.S.A., Inc.'s unverified complaint for itself alone, and for no
3 other party, by and through its attorneys of record, Morison Ansa Holden Assuncao & Prough,
4 LLP as follows:

5 GENERAL DENIAL

6 Pursuant to California Code of Civil Procedure section 431.30(d), USF&G generally and
7 specifically denies each and every allegation contained in plaintiff's complaint. USF&G
8 specifically denies that plaintiff has been damaged in any sum or sums whatsoever, or by reason
9 of any conduct of USF&G. USF&G specifically denies that plaintiff is entitled to any relief as
10 against USF&G.

11 For further and separate affirmative defenses to plaintiff's complaint, and each and every
12 cause of action therein, USF&G states and alleges and follows:

13 FIRST AFFIRMATIVE DEFENSE

14 Plaintiff's complaint, and each and every cause of action therein, fails to state facts
15 sufficient to impose any duty on USF&G to defend Home Depot, USA, Inc. ("Home Depot")
16 under the USF&G insurance contract referred to in paragraph 8 of plaintiff's complaint ("the
17 USF&G insurance contract").

18 SECOND AFFIRMATIVE DEFENSE

19 Plaintiff's complaint, and each and every cause of action therein, fails to state facts
20 sufficient to impose any duty on USF&G to indemnify Home Depot under the USF&G insurance
21 contract.

22 THIRD AFFIRMATIVE DEFENSE

23 Plaintiff's claims against USF&G are barred, in whole or in part, pursuant to the terms,
24 provisions, definitions, endorsements, conditions, limitations, and exclusions set forth in the
25 USF&G insurance contract.

26 FOURTH AFFIRMATIVE DEFENSE

27 Plaintiff's claims against USF&G are barred, in whole or in part, by virtue of the fact that
28 Home Depot is not an insured under the USF&G insurance contract, and/or is not an insured for

1 the claims for which it is alleged USF&G had a duty to defend and/or indemnify Home Depot.

2 FIFTH AFFIRMATIVE DEFENSE

3 The USF&G insurance contract provides coverage only for sums that an insured becomes
4 legally obligated to pay as damages. Plaintiff's complaint is barred to the extent that it seeks
5 reimbursement, contribution or indemnification for, or is based on, losses that do not constitute
6 damages that an insured is legally obligated to pay.

7 SIXTH AFFIRMATIVE DEFENSE

8 The USF&G insurance contract provides coverage only for "bodily injury" or "property
9 damage" as those terms are defined in the USF&G insurance contract. Plaintiff's complaint is
10 barred to the extent that it seeks reimbursement, contribution or indemnification for, or is based
11 on, damages other than for "bodily injury" or "property damage."

12 SEVENTH AFFIRMATIVE DEFENSE

13 The USF&G insurance contract provides coverage only for "bodily injury" or "property
14 damage" caused by an "occurrence," as those terms are defined in the USF&G insurance contract.
15 Plaintiff's complaint is barred to the extent that it seeks reimbursement, contribution or
16 indemnification for, or is based on, damages other than for "bodily injury" or "property damage"
17 that was caused by an "occurrence."

18 EIGHTH AFFIRMATIVE DEFENSE

19 The USF&G insurance contract provides coverage only for "bodily injury" or "property
20 damage" that occurred during the effective period of the USF&G insurance contract. Plaintiff's
21 complaint is barred to the extent that it seeks reimbursement, contribution or indemnification for,
22 or is based on, damages that occurred before the inception or after the expiration of the USF&G
23 insurance contract.

24 NINTH AFFIRMATIVE DEFENSE

25 The USF&G insurance contract provides coverage only for damages that are contingent,
26 unknown or fortuitous. Plaintiff's complaint is barred to the extent that it seeks reimbursement,
27 contribution or indemnification for, or is based on, damages that were not contingent, unknown or
28 fortuitous.

1 TENTH AFFIRMATIVE DEFENSE

2 The USF&G insurance contract does not provide coverage for the cost to repair or replace
3 the insured's faulty or defective work. Plaintiff's complaint is barred to the extent that it seeks
4 reimbursement, contribution or indemnification for, or is based on, the cost to repair or replace an
5 insured's faulty or defective work.

6 ELEVENTH AFFIRMATIVE DEFENSE

7 The USF&G insurance contract does not provide coverage for "bodily injury" or "property
8 damage" for which the insured is obligated to pay damages by reason of the assumption of
9 liability in a contract or agreement, unless the insured assumed liability for such damages in a
10 contract or agreement that is an "insured contract," and the "bodily injury" or "property damage"
11 occurred subsequent to the execution of the contract or agreement, or the insured would have
12 been liable for the damages in the absence of the contract or agreement. Plaintiff's complaint is
13 barred to the extent that it seeks reimbursement, contribution or indemnification for, or is based
14 on, coverage for "bodily injury" or "property damage" for which an insured is obligated to pay
15 damages by reason of the assumption of liability in a contract or agreement, unless the insured
16 assumed liability for such damages in a contract or agreement that is an "insured contract," and
17 the "bodily injury" or "property damage" occurred subsequent to the execution of the contract or
18 agreement, or the insured would have been liable for the damages in the absence of the contract
19 or agreement.

20 TWELFTH AFFIRMATIVE DEFENSE

21 Plaintiff's complaint is barred because it fails to conform with the requirements of Code of
22 Civil Procedure section 425.10.

23 THIRTEENTH AFFIRMATIVE DEFENSE

24 Plaintiff's claim for breach of contract is barred because plaintiff has not suffered any
25 damages as a result of any alleged breach.

26 FOURTEENTH AFFIRMATIVE DEFENSE

27 The USF&G insurance contract does not provide coverage for "property damage" to "your
28 work" arising out of it or any part of it and included in the "products-completed operations

1 hazard," unless the damaged work or the work out of which the damage arises was performed on
2 your behalf by a subcontractor. Plaintiff's complaint is barred to the extent that it seeks
3 reimbursement, contribution or indemnification for, or is based on, "property damage" to "your
4 work" arising out of it or any part of it and included in the "products-completed operations
5 hazard," unless the damaged work or the work out of which the damage arises was performed on
6 the named insured's behalf by a subcontractor.

7 FIFTEENTH AFFIRMATIVE DEFENSE

8 The USF&G insurance contract does not provide coverage for "property damage" to
9 "impaired property," or property that has not been physically injured arising out of (1) a defect,
10 deficiency, inadequacy or dangerous condition in "your product" or "your work" or (2) a delay or
11 failure by you or anyone acting on your behalf to perform a contract or agreement in accordance
12 with its terms. Plaintiff's complaint is barred to the extent that it seeks reimbursement,
13 contribution or indemnification for, or is based on, "property damage" to "impaired property," or
14 property that has not been physically injured arising out of (1) a defect, deficiency, inadequacy or
15 dangerous condition in "your product" or "your work" or (2) a delay or failure by you or anyone
16 acting on your behalf to perform a contract or agreement in accordance with its terms.

17 SIXTEENTH AFFIRMATIVE DEFENSE

18 Plaintiff's complaint is barred to the extent that Home Depot failed to cooperate with
19 USF&G, which cooperation is a condition precedent to coverage under the USF&G insurance
20 contract.

21 SEVENTEENTH AFFIRMATIVE DEFENSE

22 Plaintiff's claims are barred, in whole or in part, to the extent that Home Depot failed to
23 perform its obligations under the USF&G insurance contract including, but not limited to, Home
24 Depot's agreement to give written notice to USF&G of any loss without unnecessary delay.

25 EIGHTEENTH AFFIRMATIVE DEFENSE

26 Plaintiff's claims are barred, in whole or in part, to the extent that plaintiff failed to
27 exercise reasonable diligence to mitigate its damages.

28 ///

1 NINETEENTH AFFIRMATIVE DEFENSE

2 Plaintiff's claims against USF&G are barred, in whole or in part, to the extent that plaintiff
3 seeks reimbursement, contribution or indemnification for obligations assumed or monies
4 voluntarily paid by Home Depot without USF&G's consent.

5 TWENTIETH AFFIRMATIVE DEFENSE

6 Coverage under the USF&G insurance contract is limited by the terms and conditions of
7 the USF&G insurance contract to the extent that other insurance is applicable to the claims at
8 issue.

9 TWENTY-FIRST AFFIRMATIVE DEFENSE

10 The USF&G insurance contract is subject to certain deductibles, per occurrence and
11 aggregate limits. The coverage available under the USF&G insurance contract, if any, is subject
12 to such deductibles and limits.

13 TWENTY-SECOND AFFIRMATIVE DEFENSE

14 Plaintiff's complaint is barred by the doctrine of laches.

15 TWENTY-THIRD AFFIRMATIVE DEFENSE

16 Plaintiff's complaint is barred by the doctrines of waiver, estoppel and unclean hands.

17 TWENTY-FOURTH AFFIRMATIVE DEFENSE

18 Plaintiff's complaint is barred due to Home Depot's waiver of any right to recovery under
19 the USF&G insurance contract.

20 TWENTY-FIFTH AFFIRMATIVE DEFENSE

21 Plaintiff's claim for tortious breach of the implied covenant of good faith and fair dealing
22 is barred because plaintiff is not an insured under the USF&G insurance contract, and/or is not an
23 insured for the claims for which it is alleged USF&G had a duty to defend and/or indemnify
24 Home Depot.

25 TWENTY-SIXTH AFFIRMATIVE DEFENSE

26 Plaintiff's claim for tortious breach of the implied covenant of good faith and fair dealing
27 is barred because there was no breach of contract by USF&G.

28

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

Plaintiff's claim for tortious breach of the implied covenant of good faith and fair dealing is barred by virtue of the fact that USF&G's position and conduct has been reasonable.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

Plaintiff's claim for tortious breach of the covenant of good faith and fair dealing is barred by virtue of the fact that the plaintiff has suffered no damages or economic detriment as a result of any act or omission of USF&G.

TWENTY-NINTH AFFIRMATIVE DEFENSE

Plaintiff's complaint, and each and every cause of action therein, fails to state facts sufficient to constitute a cause of action against USF&G upon which relief can be granted.

THIRTIETH AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable statutes of limitation including, but not limited to, California Code of Civil Procedure section 337.

THIRTY-FIRST AFFIRMATIVE DEFENSE

Plaintiff's claims are barred by the applicable statute of repose.

THIRTY-SECOND AFFIRMATIVE DEFENSE

To the extent that coverage, if any, is found under the USF&G insurance contract, USF&G is entitled to have such loss equitably apportioned among all insurers and policies also affording coverage for such loss, including any self-insurance or self-insured retention of any insured or of any party.

THIRTY-THIRD AFFIRMATIVE DEFENSE

USF&G has no duty to reimburse plaintiff for any portion of the defense costs incurred, judgment entered and/or settlement reached which pertains to covered damages, if any, unless and until the limits of any applicable deductible have been exhausted.

THIRTY-FOURTH AFFIRMATIVE DEFENSE

USF&G has no duty to reimburse Home Depot for any defense costs incurred in defending Home Depot which were not reasonable and necessary.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

USF&G has no duty to reimburse Home Depot for any defense costs incurred in defending Home Depot prior to the date of tender to USF&G.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

Plaintiff's complaint fails to allege with any particularity the terms, provisions, exclusions, conditions, or limitations allegedly contained in any insurance contract entered into by USF&G. USF&G is therefore unable to set forth all potentially applicable defenses and specifically reserves its rights to later allege any theories and/or additional affirmative defenses, policy defenses and/or applicable policy terms, conditions, limitations or exclusions based on information which may become apparent during the continuing course of discovery or other investigation in this litigation.

WHEREFORE, having fully answered plaintiff's complaint and having asserted its affirmative defenses thereto, defendant USF&G respectfully prays for judgment in its favor and against plaintiff as follows:

1. That plaintiff take nothing by reason of its complaint on file herein;
2. That this Court adjudge, determine, and decree that USF&G was not obligated to defend or indemnify Home Depot in the underlying litigation;
3. That this Court adjudge, determine and decree that USF&G is entitled to its costs and disbursements in this action, including, but not limited to reasonable attorneys' fees; and
4. For such other and further relief as the Court may deem just and proper.

Dated: February 15, 2008

MORISON ANSA HOLDEN ASSUNCAO
& PROUGH, LLP

By: 

Marc J. Derewetzky

Attorneys for Defendant
UNITED STATES FIDELITY &
GUARANTY COMPANY

122081

PROOF OF SERVICE

I, the undersigned, an employee of Morison Ansa Holden Assuncao & Prough, LLP, located at 500 Ygnacio Valley Road, Suite 450, Walnut Creek, California 94596-8068, am over the age of 18 years and am not a party to this matter, action or proceeding.

On February 19, 2008, I served a copy of the following document(s):

DEFENDANT UNITED STATES FIDELITY & GUARANTY
COMPANY'S ANSWER TO PLAINTIFF HOME DEPOT U.S.A.,
INC.'S COMPLAINT

to the person(s) at the address(es) shown below:

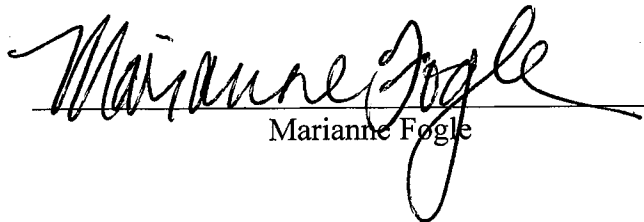
Joshua S. Goodman, Esq.
Jenkins Goodman
Neuman & Hamilton LLP
417 Montgomery Street, 10th Floor
San Francisco, CA 94104

 X **BY U.S. MAIL:** I placed the document(s) for collection and processing for mailing with the United States Postal Service in Walnut Creek, California. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and processing for mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope or package with postage fully prepaid.

 BY OVERNIGHT DELIVERY: I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier, with delivery fees paid or provided for, and addressed to the person(s) to be served at the address(es) below, and placed the envelope or package for collection and overnight delivery. I am familiar with this firm's practice of collecting and processing correspondence for overnight delivery. On the same day that correspondence is placed for collection and processing for overnight delivery, it is dropped off at an office or regularly utilized drop box of the overnight delivery carrier, or picked up by the overnight delivery carrier, at Walnut Creek, California, and delivered the next day to the person(s) listed on this Proof of Service.

 BY PERSONAL SERVICE: I caused the above-referenced document(s) to be personally served by a legal support service provider. See separate Declaration of Messenger.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 19, 2008, at Walnut Creek, California .


Marianne Fogle